No. 83-58

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

PHILADELPHIA LIFT TRUCK CORP.,
Petitioner

v.

TAYLOR MACHINE WORKS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REASONS FOR DENYING THE PETITION

Point I — This Case Does Not Involve Any Special Or Important Reason Which Would Warrant The Exercise Of This Court's Discretion In Granting The Writ of Certiorari.

The particular market situation which existed prior to the termination of Philadelphia Lift Truck Corporation as a distributor of products manufactured by Taylor Machine Works, Inc., was highly unusual.* Indeed, research has failed to reveal any reported case which involved facts which were closely analogous to the facts involved here. Thus, the present case does not have any implications to the enforcement or interpretation of the Sherman Act. Petitioner has failed to assert any other factors which would warrant review by this Court. (U. S. Sup. Ct. Rule 19.)

In the present case the lower court, sitting without a jury, heard testimony that demonstrated that Taylor Machine Works was quite dissatisfied with the performance of Philadelphia Lift Truck as a Taylor dealer. In particular, the lower court specifically found that, "Taylor had reason to believe that Philadelphia was undercapitalized." (Appendix C, 8a.) Moreover, there was a continuing problem with respect to the payment by Philadelphia Lift Truck for parts purchased from Taylor. It was stipulated by the parties to this action that Philadelphia Lift Truck had been placed on a C.O.D. basis by Taylor on at least three occasions prior to 1978. Despite repeated assurances by Philadelphia Lift Truck that the parts account would be kept current, this payment delinquency problem persisted. With regard to the success of Philadelphia Lift Truck in the sales of Taylor fork-lift trucks, in 1976 and 1977 Philadelphia Lift Truck ordered 16 fork-lift trucks from Taylor, of which 13 were to

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*Taylor Machine Works, Inc., respondent in these proceedings, is not owned by any parent corporation, nor does it have an ownership interest in any subsidiaries, nor does it have any corporate affiliates.

a single account, Lavino Shipping Company. (Appendix C, 8a.) The lower court confirmed that Taylor had good reason to be dissatisfied with the performance of Philadelphia Lift Truck and that this dissatisfaction was the prime reason for seeking to appoint Markim Equipment Company as its dealer in this area: "Taylor's decision to have Markim as its exclusive dealer was based on legitimate business reasons. Most important of which were the lack of sales success of Philadelphia as its dealer." (Appendix C, 8a.)

Thus, this was the situation confronting Taylor in November 1977, when it was contacted by Markim Equipment Company, a large crane dealer in the Philadelphia area. At that time Markim inquired into the possibility of becoming a distributor of Taylor's products. An investigation was made by Taylor into the background of Markim. Taylor learned that Markim had a large, technically-competent sales staff, that Markim was well capitalized, and that it carried other equipment lines which were compatible with Taylor fork-lift trucks. (Appendix C, 8a.) Thus, Taylor was quite favorably disposed towards the appointment of Markim as its new dealer in the Philadelphia area because of these obvious marketing advantages which Philadelphia Lift Truck did not possess.

There is no dispute between the parties that Taylor could have terminated Philadelphia Lift Truck in March 1978 simply by giving the 30-days' notice provided in the dealership agreement. Taylor could then have assigned the entire Philadelphia area to its new dealer, Markim. However, rather than exercising that option, Taylor offered Philadelphia Lift Truck the opportunity to remain as a Taylor dealer. As stated in the March addendum, all territory previously assigned to Philadelphia Lift Truck would be withdrawn with the exception of the Lavino account. In addition, Philadelphia Lift Truck could continue to purchase parts and could purchase trucks for its rental fleet. Shortly after the addendum was sent to Philadelphia Lift Truck for execution, Taylor sent a dealership agreement to Markim for execution.

Philadelphia Lift Truck had the option of not signing the addendum, in which case the relationship with Taylor would have been terminated. Philadelphia Lift Truck could then have sought to obtain a new line of heavy-duty, fork-lift trucks to sell, or it could have concentrated its efforts on selling a different, smaller line of fork-lift trucks. Philadelphia Lift Truck nevertheless chose to sign the addendum. Thus, Taylor hoped that the net result of the addendum and the subsequent appointment of Markim as a Taylor dealer would be greater efficiency in the distribution of Taylor products in the Philadelphia area. Markim was expected to achieve the market penetration that Philadelphia Lift Truck was unable to supply, while at the same time Philadelphia Lift Truck could continue to solicit sales from Lavino, at which Philadelphia Lift Truck had demonstrated that it could be highly successful in its sales effort. The lower court specifically found: "It's possible and was permissible for Taylor to believe, given Philadelphia's sales record, that the intrabrand marketing scheme that they determined upon in March of 1978, one dealer, one customer, was best suited to maximize Taylor's position in the interbrand market." (Appendix C, 9a.)

In summary, the "one dealer, one customer" situation which existed after the execution of the addendum to the dealership agreement in March 1978 was a legitimate, albeit unusual, response to the market situation which existed in the Philadelphia area at that time. This case does not have any implications for the enforcement of the antitrust laws because the same set of circumstances may never arise again.

Point II — The Decision Of The Lower Court Is Founded Upon Findings Of Fact Which Should Not Be Set Aside Unless "Clearly Erroneous".

The granting of review would also be inappropriate because the lower court, sitting without a jury, rendered certain findings of fact which should not be disturbed on appeal unless "clearly erroneous". *Inwood Laboratories*,

Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982). In addition to its finding that Taylor had legitimate business reasons for entering into the addendum in March 1978 and in terminating Philadelphia Lift Truck in June 1978, the lower court also specifically found that Philadelphia Lift Truck had failed to demonstrate that its termination as a Taylor dealer was brought about by pressures and complaints received by Taylor from the competing dealer, Markim. If review were to be granted, the entire record below would have to be perused in order to determine whether this Court is left with the "definite and firm conviction that a mistake has been committed." 456 U.S. at 855.

In its bench opinion the lower court found that Philadelphia Lift Truck had failed to establish that there was a causal relationship between any acts on the part of Markim Equipment Company and the termination of Philadelphia Lift Truck as a Taylor dealer. Specifically, the court stated:

> A causal relationship between competitor complaint and the termination is a necessary first step to proving a Section I violation as *Sweeney* makes clear. However, the mere receipt of complaints is insufficient to prove a causal nexus. That such a nexus exists on these facts, given the many good reasons for terminating Philadelphia such as its poor sales record and its admitted amounts owed to Taylor, it cannot be said that Markim's complaints were a "but for" cause of the termination. (Appendix C, 11a.)

The lower court's holding in this regard was consistent with, and made specific reference to, the Third Circuit's decision in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911. However, there was one major distinction between *Sweeney* and the instant case. In *Sweeney* the district court directed a verdict against appellants after

the close of all of the evidence. In the instant case the district court sat without a jury, and, thus, its finding of no causal relationship between the complaints and the termination is entitled to even greater weight than the lower court decision in *Sweeney*.

With regard to the cancellation in April 1978 of an order for two Taylor fork-lift trucks obtained by Philadelphia Lift Truck for shipment to Phoenix Steel, Philadelphia Lift Truck attempted at trial to convince the lower court that Taylor intentionally delayed shipment of these two trucks to Phoenix Steel and conspired with Markim to divert the sale from Philadelphia Lift Truck to Markim. However, the lower court specifically held that, "Philadelphia has not met its burden of proving that Markim caused this cancellation. In other words, we find here unilateral action on the part of Taylor which does not fall within Section I of the Sherman Act." (Appendix C, 15a.)

Philadelphia Lift Truck called no witnesses at trial who were associated with Markim. Thus, there was no evidence that Markim was even aware of the sale by Philadelphia Lift Truck to Phoenix Steel prior to the time when Markim was contacted by the purchasing agent for Phoenix Steel. In short, there was no compelling evidence to support the finding of a conspiracy between Markim and Taylor regarding the cancellation of this order. Philadelphia Lift Truck had the burden of proof on this issue, and the trial court correctly found that Philadelphia Lift Truck had failed to satisfy this burden. In any event, the conclusions of the trial court in this regard are certainly not "clearly erroneous", and, thus, this would not be an appropriate case for review by this Court.

Point III — The Lower Court Properly Applied A "Rule-Of-Reason" Analysis To These Transactions, And Further Properly Concluded That Petitioner Failed To Demonstrate A Substantial Impact On Or A Restraint

Of Trade Affecting *Interbrand* Competition In The Particular Product Market.

Petitioner asserts that, "The instant restraint was so manifestly anticompetitive and had such a pernicious effect on competition, and lacked any redeeming virtue that this is just the type of restraint that should be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm that it caused or the business excuse for its use." (Petitioner's Brief, 9-10.) The lower court duly considered this argument by appellant and rejected it. The lower court properly concluded that the case was governed by this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and that under *Sylvania* a rule-of-reason analysis was required. (Appendix C, 7a).

The most glaring omission in this argument by petitioner in support of the application of a per se rule is its failure to categorize this particular agreement in any of the judicially-recognized per se categories such as price fixing, horizontal division of markets, etc. Instead, petitioner is arguing in favor of an "ad hoc" application of the per se rule. However, this Court has consistently warned that additions to the limited per se list are not to be made on an ad hoc basis. For example, in *White Motor Co. v. United States*, 372 U.S. 253 (1963), this Court considered the legality of a vertical territorial restraint. In rejecting the application of the per se rule at that time, this Court stated:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practical means a small company has for breaking into business . . . and within the "rule of reason". We need to know more than we do about the actual impact of these

> arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as per se violations of the Sherman Act. 372 U.S. at 263.

See also, *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977).

Petitioner has not referred this Court to any "body of judicial experience" dealing with "one-customer restrictions". Indeed, as noted above, this case, in which a dealership agreement was modified so as to assign the dealer a single customer, may well be unique in the United States. However, it must be recalled that this "single customer" represented approximately 75% of the sales made by petitioner over a four-year period. In light of the success experienced by Philadelphia Lift Truck with this single customer, as contrasted with the lack of any real penetration in the remaining Philadelphia market, the lower court properly concluded that it did not have sufficient information and experience to conclude that this type of agreement should be labeled as a per se violation of the Sherman Act. In the absence of any prior experience as to the effect of this type of arrangement on competition, the lower court correctly applied a rule-of-reason analysis to this particular case.

Having thus concluded that the rule of reason would apply in this situation, it was then necessary for the court to determine whether Philadelphia Lift Truck had proved a substantial impact on or a restraint of trade affecting interbrand competition in this particular product market. However, the lower court found that the record was totally devoid of any such evidence. The Third Circuit's decisions in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), and *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528 (3d Cir. 1979), make it clear that

there must be a showing of an anticompetitive effect on interbrand competition in order to make out a case under the rule of reason. See also, *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1006 (5th Cir.), cert. denied, 454 U.S. 1080 (1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), cert. denied, 446 U.S. 965 (1980).

Since petitioner failed to demonstrate any anticompetitive effects on interbrand competition, and since there were legitimate business reasons to support the decisions made by Taylor regarding Philadelphia Lift Truck, the decision of the lower court was manifestly correct, and, thus, review should not be granted by this Court.

CONCLUSION

For the foregoing reasons, as well as any additional reasons set forth in the district court's opinion, which was affirmed per curiam by the Third Circuit Court of Appeals, respondent, Taylor Machine Works, Inc., respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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By ______________________________

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